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No. 159

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Docket No. 21733

UNITED STATES OF AMERICA,

Appellee,

—v.—

LEONARD ROYAL AIKEN,

Appellant.

BRIEF AND APPENDIX FOR THE UNITED STATES OF AMERICA

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United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

– v. –

LEONARD ROYAL AIKEN,
Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

This is an appeal by Leonard Royal Aiken from a judgment of conviction entered on June 29, 1961 in the United States District Court for the Southern District of New York, after an eleven-day trial before the Honorable J. Skelly Wright and a jury.

The indictment was filed on March 3, 1961 and charged in the Eighth Count that appellant Leonard Royal Aiken, named therein as "John Doe, a/k/a 'Leon'", with a certain physical description, had conspired to violate the Federal narcotics laws, Title 21, United States Code, Sections 173 and 174, together with co-defendants Winston Massiah, Jesse Colson, Mitchell Anfield, Granville Smith, Noel Maxwell, William Adams, John Henry Purry, Clarence White, Nick Holiday, Icky Thorn and Sylvia Ferris, and with various persons who were named as co-conspirators but not as co-defendants, and other persons to the Grand Jury unknown. The conspiracy related to the importation of cocaine from Chile and its distribution in

the United States between January 1, 1956 and March 3, 1961.

The Eighth Count was the only count which named appellant. Count One of the indictment charged that on or about May 6, 1958 Massiah, Colson and Anfield unlawfully possessed a narcotic drug on board a United States vessel, in violation of Title 21, United States Code, Section 184a and Title 18, United States Code, Section 2. Count Two charged that the same three defendants unlawfully imported, received, concealed, bought, sold and facilitated the transportation, concealment and sale of narcotic drugs on or about May 6, 1958, in violation of Title 21, United States Code, Sections 173 and 174. Count Seven charged that on or about May 6, 1958 Massiah, Colson and Ferris possessed and dealt with narcotics not in the original stamped package, in violation of Title 26, United States Code, Sections 4701, 4703, 4704(a), 4771(a) and 7237(a).

Counts Three, Four, Five and Six made charges against persons who did not stand trial with appellant, and thus are not relevant here.

In the instant trial Massiah, Anfield, Thorn and appellant Aiken were the defendants, and on June 29, 1961 the jury found all four guilty on the Eighth Count, the consiracy count.* Massiah was also found guilty on three substantive counts (One, Two and Seven).

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* Jesse Colson pleaded guilty to Counts One, Two, Seven and Eight. The cases of the defendants Noel Maxwell, William Adams, John Henry Purry, Clarence White and Sylvia Ferris have been severed and are awaiting trial. The defendants Granville Smith and Nick Holiday are fugitives and have not pleaded to the indictment.

On June 29, appellant was sentenced as a second narcotics offender to thirteen years imprisonment. He is presently enlarged on $50,000 bail.

Statutes and Rule Involved

Title 21, Section 173

U. S. Code

173. *Importation of narcotic drugs prohibited; exceptions; crude opium for manufacture of heroin; forfeitures.* It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only may be imported and brought into the United States or such territory under such regulations as the Commissioner of Narcotics shall precribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin. All narcotic drugs imported under such regulations shall be subject to the duties which are now or may hereafter be imposed upon such drugs when imported.

Any narcotic drug imported or brought into the United States or any territory under its control or jurisdiction, contrary to law, shall (1) if smoking opium or opium prepared for smoking, be seized and summarily forfeited to the United States Government without the necessity of instituting forfeiture proceedings of any character; or (2) if any other narcotic drug be seized and forfeited to the United States Government, without regard to its value, in the manner provided by sections 514 and 515 of Title 19, or the provisions of law hereafter enacted which are amendatory of, or in substitution for, such sections. Any

narcotic drug which is forfeited in a proceeding for condemnation or not claimed under such sections, or which is summarily forfeited as provided in this subdivision, shall be placed in the custody of the Commissioner of Narcotics and in his discretion be destroyed or delivered to some agency of the United States Government for use for medical or scientific purposes. (Feb. 9, 1909, ch. 100, §2, 35 Stat. 614; Jan. 17, 1914, ch. 9, 38 Stat. 275; May 26, 1922, ch. 202, §1, 42 Stat. 596; June 7, 1924, ch. 352, 43 Stat. 657; June 14, 1930, ch. 488, §3, 46 Stat. 586.)

TITLE 21, SECTION 174

U. S. CODE

§174. Same; penalty; evidence.

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of

the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

For provision relating to sentencing, probation, etc., see section 7237(d) of the Internal Revenue Code of 1954. (As amended July 18, 1956, ch. 629, title I, §105, 70 Stat. 570.)

TITLE 18, SECTION 371

U. S. CODE

§371. *Conspiracy to commit offense or to defraud United States.*

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

RULE 30, FEDERAL RULES OF CRIMINAL PROCEDURE

INSTRUCTIONS

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time

copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

Questions Presented

1A. Whether appellant may object to the manner in which the lower Court charged on an element of the conspiracy, when appellant made no objection below nor submitted any requests to charge on this point.

1B. Whether the Court charged that the Government had to show appellant's knowledge that narcotics had been illegally imported and whether there was sufficient evidence to support the conviction under that charge.

2. Whether the lower Court properly admitted evidence that at the time of appellant's arrest appellant had attempted to avoid prosecution by offering illegal business opportunities to the arresting agent.

3. Whether the lower Court correctly denied a belated request to charge, which had already been covered, which was ambiguous, and which related to an issue on which there was no evidence before the jury.

Statement of Facts

The conspiracy

Winston Massiah and Jesse Colson began to import cocaine illegally in 1956, while they were working as merchant seamen with the Grace Line. They obtained the cocaine in Chile and smuggled it ashore in New York through longshoremen (G.1a-G.28a).* In the fall of 1956, a Mitchell Anfield, who also was a seaman, joined the conspiracy as an importer (G.28a-G.30a). Co-conspirator Icky Thorn (30a, 55a-59a) and appellant purchased cocaine in large quantities from the seamen. The Government showed at least twelve illegal importations of narcotics by the seamen (G.1a-G.30a, 38a-47a, 161a) and seven purchases by appellant (21a-60a). Appellant purchased cocaine in quantities varying from a half ounce on the first purchase (at a cost of $300) to a kilogram on two of his last purchases (at a cost of approximately $12,000 each).

Appellant joins the conspiracy—sale of ½ ounce in the fall of 1957

In the fall of 1957, Jesse Colson, who was then actively importing cocaine, had a conversation with a person named Leon "Schoolboy" Ellis, while riding in an automobile. Ellis said that he had heard that Colson was bringing in cocaine and that he (Ellis) would like to work for him. Colson replied that if Ellis got a customer, he should then contact Colson (21a).

Ellis then went out to look for customers. He was approached by a man named Tillie, who said to him, "Man, you are riding around with the man bringing the good coke in." Ellis answered, "Yes, that's my man." Tillie

* References with the prefix "G." are to the Government's appendix. All other references are to appellant's appendix.

then asked Ellis to get him some narcotics, and Ellis quoted Tillie the price of $50 a spoon (123a). Tillie told Ellis that he had $300 for this purchase (22a).

Ellis contacted Jesse Colson. No arrangements were made at first, because Ellis said that Tillie wanted to go to Colson's house to receive the cocaine and Colson refused to deliver under those circumstances. Shortly after, however, Tillie gave Ellis $300, for which Ellis obtained a half ounce of pure cocaine from Colson (23a). Ellis met Tillie in a bar and the two of them went to a building on West 141st Street, between Seventh and Eighth Avenues (23a-24a).

Ellis and Tillie entered an apartment where they were soon joined by appellant, whom they knew as "Leon" (25a).* Appellant asked Tillie if he had the narcotics. Tillie, who had been carrying the cocaine which Ellis had delivered, then gave the cocaine to appellant. Appellant measured the cocaine, said it was a little short, and asked Ellis to contact his supplier. Ellis said that he could not do so and appellant told him to forget it. Appellant asked Ellis to deliver the cocaine to a point on 136th Street, for which he paid Ellis $15 (26a).

Sale of 10-12 ounces in January 1958

In January of 1958, Jesse Colson told Ellis that he had a package of 10 to 12 ounces of cocaine which he wished to sell in one lot at a wholesale price. Ellis discussed this offer with appellant who said that he would take the whole lot if it was pure. Ellis checked with Colson, and reported

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* Ellis was called "Schoolboy" by the persons who dealt with him. The name "Leon" was also used for appellant by Colson, the one who identified appellant, and was the only name by which Colson knew appellant (325a-326a).

to Aiken that it was pure, and that it would cost $5,000. The next night appellant gave Ellis $5,000 in advance. When Ellis took the money to Colson, however, it developed that co-conspirator Icky Thorn needed cocaine for a customer of his. Colson thereupon decided to give half the shipment to Thorn and half to Ellis for delivery to appellant. Ellis delivered his cocaine to appellant and returned $2500 (30a-31a).

Sales to appellant by the importers

In about the third week of January, 1958, Colson told Ellis that he would like to meet Aiken, because "he seemed like a big man" (32a). Ellis arranged a meeting in a bar and introduced Colson and appellant, who then had a conversation which Ellis did not hear.

Ellis left New York because of a death in his family and was away during the end of January and most of February, 1958. When he returned to New York, Colson reported that he and co-conspirator Mitchell "Duke" Anfield had sold the last of their cocaine to appellant while Ellis was away (33a). Ellis also had a conversation with Anfield, who said that he was angry at Colson, whom he accused of cheating. In March Ellis met Anfield walking on 140th Street with a package which Anfield said was for delivery to the appellant. Anfield made the delivery and gave Ellis $75 (36a).

Sale of one kilo in September 1958

In May of 1958, the cocaine importation was stopped because Customs Agents in New York City seized a shipment which co-conspirator Massiah had brought on the S.S. Santa Maria. The traffic did not resume until Sep-

tember, when two Chileans brought cocaine to Colson at his home (38a-39a, 161a-162a). Ellis went to Colson's home, where he watched the delivery of cellophane packages containing cocaine and helped Colson place the cocaine in two large jars. Colson told Ellis to take a sample to appellant and to tell him that "everything was all right" (39a).

Ellis did so and appellant asked what the price would be. Ellis said that appellant could get anything that he wanted. Appellant replied that he wished to see Colson and talk about the price. Approximately 3 or 4 days after this, Colson told Ellis that he had arranged a price with appellant and that on the following night he was going to deliver a kilo of cocaine to appellant. Approximately 2 or 3 days after this conversation, Colson and Ellis met appellant on the street and delivered the cocaine. Appellant told him to give the package to a man named Mersh who was present (44a). Ellis left and Colson later told him that appellant had paid $12,000 for the cocaine.

Sale of one kilo in October 1958

In October, another shipment of cocaine was delivered to Colson's home by two Spanish speaking persons, one of whom had participated in the earlier delivery. Ellis again helped Colson transfer the cocaine to jars and again Colson gave him a sample to take to appellant. Appellant told him that he had to raise some money (41a). A couple of days later, Colson told Ellis that he was going to deliver a kilo to appellant that night. The two of them went to a place where they kept the cocaine and then met appellant on 136th Street. Colson told Ellis

to give appellant the jar of cocaine and he did (40a). Appellant and Colson left to get the money and later Colson told Ellis that appellant had given him $12,000 (49a). Ellis received 10% commission on both deliveries (52a-53a).

Seventh sale

About the end of October or early November, appellant and Ellis went to a hotel in the area between West 115th and West 119th Street, in Manhattan, where Icky Thorn was living. When they arrived, Jesse Colson was also there. After a conversation between Colson and appellant, which Ellis did not hear, Colson taped up a jar containing a white substance, and told Ellis to take it to 136th Street. Appellant instructed Ellis to deliver the jar to Mersh, and Ellis did so (56a-59a).

Appellant's Arrest

In the summer of 1959 Colson was arrested and identified appellant as an important customer whom he knew only as "Leon" (321a-322a). He also gave a description of appellant which was used to identify Aiken in the indictment (307a-308a).* Appellant was indicted in March of 1961 and a "John Doe" bench warrant issued.

On May 13, 1961 Customs Agent Finbarr Murphy arrested appellant on the bench warrant, at which time

* In November, Government agents also learned of Leon (Schoolboy) Ellis (327a-328a) whom Colson described as "Schoolboy", a person engaged in the conspiracy, distinct from "Leon" (Aiken) (326a). Leon "Schoolboy" Ellis was arrested on a related charge in April of 1961, after the instant indictment had been returned, but was not included in this indictment.

Aiken admitted that he was known as "Leon", and that he had known a person named "Schoolboy" for the past two or three years. Appellant was then arraigned and remanded in lieu of bail.

Agent Murphy drove appellant to the Federal House of Detention, and just before they got out of the agent's car the two men had a conversation which appellant now attacks as inadmissible. Murphy told Aiken to get out of the car, and said that he was going to place him in the Federal House of Detention. Aiken began to sweat and the left side of his face was twitching. When Murphy repeated his command Aiken said "Wait a minute". Murphy answered, "Why?" Aiken said, "If you get any stuff you want to get rid of, call me." The rest of this conversation, as testified to by Murphy, is set forth in the margin.*

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* "I said to him, 'I can trust you? Do you know who I am?'
He said, 'Yes'. I said, 'Well, as of last night I never even met you.'
He says 'Don't worry. You can trust me.'
I said, 'I don't work like that. If I am going to work with you, I've got to know who you are doing business with.'
He said, 'What do you mean?'
I said, 'Well, I have a lot to lose here.'
So I told him, 'I've got to have references. Give me some people that I can check up.' I said, 'I got to have references of people that have done business with you before, before I go into anything with you.'
And this conversation terminated, and I took him into the Federal House" (300a).

The Trial

At the trial Leon "Schoolboy" Ellis testified to the sales and deliveries which he made to appellant (19a-60a). Agent Murphy testified to his conversation with appellant at the time of the latter's arrest (297a-300a). Neither appellant nor any other defendant took the stand or offered any evidence by way of defense.

POINT I

This Court should reject appellant's objection to the manner in which the lower Court charged on an element of the conspiracy, since no objection was made below, since the jury was properly charged on all elements of the conspiracy and since the jury's verdict was supported by substantial evidence.

Appellant argues that the Trial Court erred in telling the jury that the conspiracy of which he was convicted was charged under Section 371 of Title 18, rather than Sections 173 and 174 of Title 21, United States Code. Appellant contends more specifically that the Court thereby omitted to charge on an essential element of the conspiracy, relating to the appellant's knowledge that the narcotics involved in the conspiracy were illegally imported. Appellant concedes, however, that he made no objection to this part of the Trial Court's charge, and the record is clear that he submitted no requests for a different charge.

The Government contends: (A) Appellant's failure to object to this part of the charge bars him from raising this

ssue on appeal, under Rule 30, Federal Rules of Criminal Procedure. (B) The Trial Court in fact did charge on the necessity of finding knowledge of illegal importation, and there was sufficient evidence to support the jury's finding that appellant had such knowledge. In addition, the statutory presumption from possession was before the jury, and there was sufficient evidence of possession to support the application of the presumption. In connection with these contentions, the Government also submits that not only was there substantial evidence of possession, but, in addition, the jury, by its verdict, necessarily found that appellant possessed narcotics, and there was no defense evidence to explain this possession. *Cf. United States* v. *Gillette*, 189 F. 2d 449 (2d Cir.), *cert. denied*, 342 U.S. 827 (1951).

The Court's Charge

The Court charged the jury first on the three substantive counts and, thereafter, on the conspiracy count.

While charging on a substantive count under Title 21, United States Code, Section 174, the Court explained the presumption which arises from possession of narcotics (348a). The Court then turned to the conspiracy count. The Trial Judge read a sentence from the general conspiracy statute, Title 18, United States Code, Section 371: "If two or more persons conspire to commit any offense against the United States, and one or more of such persons do any act to effect the object of the conspiracy, each shall be punished as provided by law" (350a). He stated that this was the offense charged. The conspiracy actually was charged under Sections 173 and 174 of Title 21, as the jury was later informed when the indictment was sent into the jury room, at the jury's request (363a).

The Court went on:

> "The conspiracy alleged in this indictment is to violate Sections 173 and 174 of Title 21, and the pertinent parts of those statutes read:
>
> "It is unlawful to import or bring any narcotic drug into the United States except such amounts as the Commissioner of Narcotics finds to be necessary for medicinal purposes. Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment or sale of such narcotic drug after importation, knowing the same to have been imported illegally, or conspires to commit any such action in violation of the laws of the United States, shall be punished" (350a-351a).

The Trial Court then defined conspiracy and what constitutes participation in a conspiracy. In this regard he said:

> "Before a jury may find that a defendant or any other person has become a member of a conspiracy the evidence must show . . . that the defendant or other person who is claimed to have been a member knowingly and wilfully participated in the unlawful plan with the intent to advance and further some object or purpose of the conspiracy" (352a).

No objections were made to this charge nor were any requests submitted by appellant for a different charge.

A. Rule 30 of the Federal Rules of Criminal Procedure Expressly Prohibits Appellant from Assigning as Error the Court's Charge, When He Neither Made Objection at Trial Nor Requested Any Other Charge on This Issue.

Rule 30, Federal Rules of Criminal Procedure, provides in part:

> "At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests . . . *No party may assign as error any portion of the charge or omission therefrom unless he objects thereto* before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection." (emphasis added)

This rule is clear and applies here. *United States* v. *Cioffi*, 253 F. 2d 494, 496 (2d Cir. 1958); *United States* v. *Bando*, 244 F. 2d 833, 844 (2d Cir.), *cert. denied*, 355 U.S. 844 (1957); *United States* v. *Sherman*, 171 F. 2d 619, 624 (2d Cir. 1948).

The rule has particular application where, as here, the appellant's objection is of a hypertechnical nature and relates to an element of proof on which the Government's evidence was overwhelming, as will be shown below.

B. The Trial Court Charged on Knowledge of Illegal Importation and the Jury Had Sufficient Evidence from Which to Find Such Knowledge.

Assuming that this Court should reach the merits of appellant's argument on this point, the Government submits that the Trial Court in fact did charge on all elements of the conspiracy, including knowledge of illegal importation, and that there was evidence of all elements to support the verdict.

1. The Trial Court Charged on Knowledge of Illegal Importation.

The Trial Court charged the jury that the objects of the conspiracy were to violate a statute prohibiting (1) illegal importation of narcotics, and (2) the performance of certain acts with respect to narcotics, knowing the same to have been illegally imported (350a-351a). The Court also charged that one could not be a member of the conspiracy unless he knowingly and willfully intended to advance and further some object or purpose of the conspiracy (352a). The plain meaning of these two statements, taken together, is that to be convicted of the conspiracy charged here, appellant must have conspired either to import narcotics illegally or to deal in narcotics, knowing them to have been illegally imported.

2. There Was Sufficient Evidence to Support Appellant's Conviction Under the Trial Court's Charge.

Knowledge of illegal importation, of course, need not be shown solely through the statutory presumption arising from proof of possession. In *United States* v. *Santore*, 290 F. 2d 51, 76, 81, 82 (2d Cir. 1960), *cert. denied*, 365

U.S. 834 (1961), a majority of the judges, sitting *in banc*, found that knowledge of illegal importation was sufficiently shown for two defendants, Casella and Santore, by a statement which Casella had made in Santore's presence that he could supply heroin "in amounts anywhere from half a kilo to a ton . . . with quality just as it comes off the boat." Judges Lumbard, Moore, Friendly, and Smith, stressing the reference to "off the boat," found that this showed knowledge of illegal importation.

In the instant case, proof of appellant's knowledge was at least as strong and was shown by two types of evidence. First, here there was substantial evidence that appellant possessed large quantities of narcotics. Aside from the statutory presumption, reason and experience permit an inference that one possessing narcotics knows that they have been illegally imported. It is generally known that narcotics are not of domestic origin and "cannot be brought into this country at all, except under regulations for medicinal use." *Yee Hem* v. *United States*, 268 U.S. 178, 184 (1925). See *United States* v. *Savage*, 292 F. 2d 264 (2d Cir. 1961). These inferences apply to the importation of cocaine. *Hooper* v. *United States*, 16 F. 2d 868 (9th Cir.), *cert. denied*, 274 U.S. 743 (1926).

Second, there was evidence from which the jury could have inferred that appellant knew that he was dealing with imported narcotics. In judging the sufficiency of the evidence on appeal, it must be viewed most favorably to the Government. *United States* v. *Tutino*, 269 F. 2d 488, 490 (2d Cir. 1959); *United States* v. *Morris*, 269 F. 2d. 100, 103 (2d Cir.), *cert. denied*, 361 U.S. 885 (1959). Ellis testified that in the fall of 1957, he arranged to sell narcotics for Jesse Colson (20a), who he knew was a seaman, and who was bringing in narcotics on his voyages (93a). He said that he rode in a car with Colson (20a). After

his talk with Colson, Ellis met a man named "Tillie" who said to him, "Man, you are riding around with the man bringing the good coke in." Ellis answered, "Yes, that's my man." Tillie said, "What about getting me some?" Ellis answered, "Yes . . . if you get some dough." (123a)

Shortly thereafter, Tillie gave Ellis $300 and Ellis obtained cocaine from Colson. He met Tillie and the two of them went to an apartment on West 141st Street. Appellant arrived and asked Tillie if he got the stuff (26a). Tillie then handed to appellant the cocaine which Ellis had obtained from Colson.

Thus Tillie, the man who was buying cocaine for appellant, stated that he knew he was dealing with men who were "bringing the good coke in." This reference to importation is much like the reference to "off the boat" in *Santore*. Viewed most favorably to the Government, this evidence leads to the inference that appellant, who was the actual buyer, knew as much about the source of the cocaine as his contact man, Tillie.

In addition, the evidence showed that appellant was considered a large dealer in narcotics and a major part of the conspiracy. In the words of Ellis and Colson, he was a 'big man". Moreover appellant handled large quantities of narcotics, often in pure form. He knew the actual importers, Colson and Anfield, and dealt directly with them on two occasions. On other occasions, the only intermediary was Ellis. Appellant was the first one to be contacted when the seamen resumed importing during the fall of 1958, after supplies had been cut off by the seizure of Massiah's cocaine on the S.S. Santa Maria. He was then offered cocaine in kilo lots and paid $12,000 for each lot.

If the inferences from this evidence, including the evidence of appellant's possession, are drawn favorably to the Government, the Government's proof of appellant's knowledge is at least as strong as that deemed sufficient by a majority of this Court in *Santore*.

3. The Statutory Presumption Was Before the Jury.

It should be recognized, moreover, that the statutory presumption from possession was before the jury. The Trial Court told the jury, when charging on Count Two, a substantive count:

"Under the law possession of narcotics gives rise to an . . . inference that the person in possession had knowledge of . . . unlawful importation" (348a). This was not repeated during the charge on the conspiracy count, but appellant made no objection or request for an additional charge. It also is true that the Court had stated that this presumption applied to prosecutions for violations of Section 174, and that the jury did not know that the conspiracy was charged under Section 174 until it sent for the indictment (363a). The presumption, however, was certainly before the jury, and, on the whole record, it was accurately stated. Since there was strong evidence of appellant's possession of narcotics to support the application of the presumption, which was before the jury, no error was committed.

* * * *

In connection with the above arguments, it should be noted that there not only was substantial evidence that appellant possessed narcotics during the conspiracy, but the jury, by its verdict, necessarily had to find such possession. The evidence of possession constituted such a

central part of the Government's case that the jury must have believed it in order to reach its verdict on other elements of the offense. This may be seen through analysis of the conspiracy charge and of the jury's verdict.

The trial court instructed the jury that to convict appellant of the conspiracy, it had to find four things: (1) That a conspiracy existed at the time alleged; (2) that appellant knowingly became a member of the conspiracy; (3) that an overt act was committed; and (4) that the overt act was in furtherance of the conspiracy (355a). When the jury found appellant guilty of conspiracy, they necessarily found all of these elements, "unless they disregarded the instructions, which we may not assume." *United States* v. *Gillette, supra,* 189 F. 2d at 454.

Thus the jury necessarily found that appellant knowingly became a member of the conspiracy, since this was one of the elements charged. The sole evidence on which the jury could have reached this conclusion was the testimony of Leon Ellis, who said that on seven occasions cocaine had been sold and delivered to appellant. Unless the jury believed Ellis, it had no basis for reaching its conclusion that appellant participated in the conspiracy.*

If the jury believed Ellis, it must have found that appellant possessed narcotics, for the sum total of Ellis' testimony with respect to appellant was a report of sales and deliveries of narcotics. In each and every case, narcotics were delivered to appellant or to a person under appellant's immediate control. The jury could not have inferred anything from Ellis' testimony unless they believed that these transactions took place. Since they inferred that appellant participated in the conspiracy,

* Agent Murphy's testimony went solely to the question of appellant's consciousness of guilt. It did not show participation in the conspiracy.

they must have found that these transactions took place. A finding that these transactions took place, finally, is the same as a finding that appellant possessed narcotics, for in each transaction, narcotics were put into his hands or under his control.*

Conclusion of Point I

In conclusion, the circumstances here make the requirements of Rule 30 particularly applicable. At best, appellant's objections, made for the first time on appeal, are directed to the manner of presentation, rather than the substance of the charge. The jury was charged to find that appellant knew that the narcotics involved in the conspiracy were illegally imported. The extent of importation by the conspirators and appellant's participation in the conspiracy as well as his actual possession of large quantities of pure narcotics makes the conclusion of his knowledge almost inescapable. In any event the evidence was far from insufficient, viewing the evidence most favorably to the Government. Moreover, the jury necessarily found that appellant had possession of narcotics,

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* The jury, by its verdict on Counts 1, 2 and 7, also found possession of narcotics by appellant's co-conspirator Massiah during the operation of the conspiracy with appellant. In *United States* v. *Santore, supra*, 290 F. 2d 51, Judge Lumbard said:

> "Both this court and others have, in the past, assumed that any principal who knows of the operation of the conspiracy is impressed with the presumption of §174 even without any evidence of physical or constructive possession. See *United States* v. *Morris*, 2 Cir., 1959, 269 F. 2d 100, *certiorari denied* 1959, 361 U. S. 885 . . . ; *United States* v. *Alexander* 7 Cir., 1955, 219 F. 2d 225." 290 F. 2d 51, 78.

He further indicated that this presumption is raised through possession by one conspirator during the conspiracy, and is raised for all conspirators who know of the operation of the conspiracy. The different test stated by Judge Clark in *United States* v. *Hernandez*, 290 F. 2d 86, 90 (2d Cir. 1961) is met by the argument in the text.

and it had before it the statutory presumption which permits the inference of such knowledge from the fact of possession. In these circumstances, there was manifestly no error.

POINT II

The Trial Court properly received evidence that appellant had attempted to avoid prosecution by offering illegal business opportunities to a federal agent.

The Lower Court's Ruling

The Government proved that at the time of appellant's arrest and just before the arresting agent was to place him in the Federal House of Detention appellant offered the agent illegal opportunities in the narcotics business. When this conversation was offered in evidence appellant objected on the ground that the evidence was not shown to be in furtherance of the conspiracy and was prejudicial. The Court said that even though the offered conversation was not in furtherance of the conspiracy it was admissible against appellant Aiken. The Court referred to a memorandum of law which it had received from the Government, which showed authority for admitting such evidence to show consciousness of guilt. The Court received the evidence and instructed the jury to consider the evidence against appellant alone. Appellant now argues that the evidence was inadmissible and that the Court's ruling constituted reversible error.

Evidence of Appellant's Offer to the Agent Was Admissible.

This Court has held squarely that where a defendant offers something of value to a Government agent for the purpose of effecting settlement of a criminal prosecution, evidence of that offer is admissible to show consciousness of guilt. *United States* v. *Picarelli*, 148 F. 2d 997 (2d Cir.), *cert. denied* 326 U.S. 722 (1945); *DiCarlo* v. *United States*, 6 F. 2d 364, 368 (2d Cir.), *cert. denied*, 268 U.S. 706 (1925). This view also has been taken by the commentators. 4 *Wigmore, Evidence*, §1061(8) (3d ed. 1940); 1 *Wharton's Criminal Evidence*, §140 (12th ed. 1955).

In *Picarelli* this Court said:

> "On the way to the police station, Picarelli pulled his car to the curb and said to the policeman, 'Listen, Officer, can't we talk this thing over?' No innocent explanation of this inquiry being vouchsafed, we think the effort to effect a settlement may be regarded as evidencing consciousness of guilt. Christian v. United States, 5 Cir., 8 F. 2d 732, 733; 4 Wigmore, Evidence, 3rd Ed., p. 31." 148 F. 2d at 998.

The rationale for admitting this evidence has been stated by Wigmore:

> "(8) In a criminal prosecution, the accused's offer to pay money or otherwise to 'settle' the prosecution will be received against him, because that mode of stopping or obstructing the prosecution would be an unlawful act, and good policy could not encourage that mode of dealing with a criminal charge; hence such an offer is receivable for whatever inference may be

drawn from it; subject, of course, to the accused's explanation." 4 *Wigmore, Evidence* §1061(8) (3d ed. 1940).

Whether or not the conspiracy had terminated before the time of this conversation is irrelevant, moreover, since the evidence was not admitted as an act in furtherance of the conspiracy.

Incidental disclosure of another crime by this testimony is not sufficient ground for excluding it, since the evidence was otherwise admissible for a proper and relevant purpose——to prove consciousness of guilt. *United States* v. *Smith*, 283 F. 2d 760 (2d Cir. 1960), *cert. denied* 365 U.S. 851 (1961); *United States* v. *Eury*, 268 F. 2d 517 (2d Cir. 1959); *United States* v. *Picarelli, supra.*

POINT III

The Trial Court properly denied appellant's request to charge on identity.

At the conclusion of the Court's charge, appellant asked the Court to charge the jury further that if "the evidence equally points to the possibility that the defendant named as Leon in the indictment might be Leon known as Schoolboy Ellis, or Leonard Royal Aiken, they must acquit." (359a) The Court denied this request and appellant now claims this was reversible error. The Court's ruling, however, was manifestly correct.

The short answer to appellant's claim of error is that, assuming *arguendo* that the request related to an issue

on which there was evidence before the jury,* the Court had already covered that issue in its charge. The Court had charged:

> "You must determine first whether the defendants on trial are the defendants named in the indictment." (356a)

Certainly this charge had covered any issue to which appellant's request could properly have been directed, and there was no abuse of discretion in declining to give a further charge.

The request itself also was defective because it was ambiguous. The jury could have interpreted it to mean that if the evidence showed that Ellis as well as appellant participated in the conspiracy they must acquit appellant. The Court could not have given a request in this form without confusing the entire case.

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* Actually there was no evidence before the jury on the question of whom the Grand Jury intended to indict. The indictment, which was applicable on its face to appellant, had been sufficient to bring him to trial. *United States* v. *Fawcett*, 115 F. 2d 764, 767 (3d Cir. 1940); *United States* v. *Pulver*, 1 F. Supp. 909 (E.D.N.Y. 1932), *aff'd* 61 F. 2d 1044 (2d Cir. 1932). Unlike the case of a removal proceeding, here the Federal Rules of Criminal Procedure do not place on the Government the affirmative burden of proving the defendant's identity before taking him to trial. Appellant did not raise the issue at arrest, on arraignment, or by motion before or during trial. He merely asked some questions on cross-examination, which themselves were not evidence and which had adduced no material evidence. As a result there was no evidence before the jury to which appellant's request could properly have been directed.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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APPENDIX

Excerpts from Testimony

(136) • • •

JAMES BARBER, called as a witness on behalf of the Government; being duly sworn, testified as follows:

Direct examination by Mr. Starkey:

Q. What is your occupation, Mr. Barber? A. Longshoreman.

Q. Do you know Winston Massiah? A. Yes, I do.

Q. When did you first meet him? A. In 1956.

Q. What part of the year? A. During the year.

Q. Do you see him in the courtroom? A. Yes, I see him behind you.

Q. Will you point him out, please? A. Behind the gentleman with the glasses on there.

Mr. Starkey: Let the record show that the witness has identified Winston Massiah.

The Court: What kind of shirt has he got on?

The Witness: A tan short, a brown shirt.

The Court: Let the record show that he identified the defendant Massiah.

Q. Where did you first meet Winston Massiah, Mr. (137) A. On the ship.

Q. What pier? A. Pier 58, North River.

Q. That is a Grace Line pier? A. That's right.

Q. Where have you worked as a longshoreman? A. What did you say?

Q. Where have you worked as a longshoreman? A. Me?

Q. Yes. A. I worked with M. P. Holly, 17 State Street. That was the office. And they had a contract with the Government during the war.

The Court: And where else?

The Witness: I worked for the United States at Pier 59, but for a short while. And I worked for Preston Stevedoring Company. At least he was the contractor.

Q. Have you been convicted of any crimes? A. I have, sir.

Q. What ones? A. I had an assault down South in 1937.

Q. Do you recall any others? A. Well, I——

(138)

The Court: You were convicted once for assault. Any other convictions?

The Witness: No.

The Court: Is that the only conviction?

The Witness: Walking in, and I worked in where there was gambling, and there was a raid.

The Court: And you were arrested in the raid?

The Witness: I was arrested and taken to enter a plea. I pleaded guilty and I paid $1 and got out.

Q. That was a gambling charge? A. Yes.

Q. And the word you used was "raid"? A. Yes.

Q. When you first met Massiah in the spring of 1956, did you have a conversation with him? A. I did so.

Q. What did he say and what did you say? A. He asked me did I want to take a package out for him and make some money, and I said, "Like what?" I said, "Whats in it?"

He said, "Don't worry about it."

Q. And this was aboard a Grace Line vessel? A. That's right.

Q. And what did you say then? (139) A. I told him I would meet him at eleven o'clock.

Q. And did you see him? A. I did so.

Q. What happened then? A. He gave me the package, and I walked to Eighth Avenue, and he walked in front of me.

Q. And then what happened? A. I walked into the men's room on the ship and I gave it to him.

Q. On the ship? A. I mean in the bar.

Q. And you gave him the package? A. That's right.

Q. Did you have any conversation at that time? A. He said he would see me later.

Q. And did you see him later? A. I did so.

Q. And what happened then? A. I was on the gangplank and he gave me some money.

Q. Did there come a time thereafter when you saw him again? A. Yes. About six weeks later.

Q. Was it another Grace Line ship at that time? A. That's right.

(140)

Q. And what was the conversation you had with him? A. Well, I met him in the hallway, and he said he had another package he wanted me to take off, and I told him I would meet him around about 9:30.

Q. And did you meet him? A. I did.

Q. What happened then? A. He gave me the package and I walked to the same bar and he was behind me.

Q. What happened at the bar? A. I gave him the package and he kept going. What was in it, I don't know.

Q. Did you have a conversation with him at that time? A. I didn't.

Q. Was there any talk about payment? A. Oh, he told me he would see me later on the ship.

Q. Did you see him later? A. I did.

Q. What happened then? A. He gave me some money but how much I don't remember.

Q. Now, did there come a time thereafter, Mr. Barber, when you met a man by the name of Jesse Colson?

(141)

Q. Who introduced you to him? A. Sonny.

Q. Who do you mean by Sonny? A. Winston.

Q. Winston Massiah? A. That's right.

Q. Where did he introduce you to him? A. In the sleeping quarters on the ship.

Q. What was the conversation at the time? A. He told me—he said that I was a friend of his and I was O.K.

Q. Was there anything else said? A. Colson told me to wait and he had a package for me to take off the ship, and I waited in the room, and he went and got it, and he brought it to me and I take it off the ship.

Q. What did you do with it then? A. I went down in the subway and gave it to him on the subway.

Q. Who did you give it to? A. To Jesse. To Jesse Massiah.

Q. You gave it to whom? A. To Jesse.

The Court: Jesse who?

(142)

The Witness: Colson.

Q. Did there come a time thereafter when you carried off a package and didn't get paid?

Mr. Carluccio: Objection, your Honor.

The Court: Don't lead the witness.

Mr. Starkey: I am sorry, your Honor.

The Court: Did this come to an end? Did this arrangement come to an end?

The Witness: Yes.

The Court: Tell the jury how it came to an end.

The Witness: On what occasion?

The Court: Did you stop carrying packages off the ship?

The Witness: I did so at that time but——

Mr. Starkey: Your Honor, if I may put this question:

Q. Did there come a time when it ended in so far as Winston Massiah was concerned? A. Yes.

Q. Will you tell the Court what happened at that occasion and right before it? A. Well, I——

Mr. Pogoda: May I at this time ask Mr. Starkey, through your Honor, whether this is under the conspiracy (143) count or under the Counts 1 and 2?

The Court: What is it, Mr. Starkey?

Mr. Starkey: This would be, I think, admissible only under the conspiracy count, your Honor.

The Court: Let us proceed.

Tell us what happened.

The Witness: At what occasion now?

Q. The last time you carried off a package for Winston, A. No, I never take anything else off for him.

Q. What happened on the last occasion? A. Which occasion are you speaking about now?

Q. The last occasion on which you carried off for Winston Massiah. A. Well, I didn't get any money.

Q. Well, how did that happen? You tell that to the Court and jury.

Mr. Carluccio: Your Honor, may I interject? Could he place the time on this last occasion?

The Court: When was this, about, do you remember?

The Witness: I do not.

The Court: Was it 1959, '58, '57 or '56?

The Witness: Honestly, I cannot remember what year it was now or what month.

(144)

Q. How long was it after you first met Winston, your best recollection? A. Well, you are asking me something that I cannot recall because I didn't remember the year and what month, or everything. I can't remember that.

Q. Well, you remember the year you first met him, don't you? A. I remember that, but I can't remember the year that was. I don't remember at the time.

The Court: About how long was it after you first met him? Was it a month, six months, a year?

The Witness: I don't want to sit up here and say something wrong that I don't know about. Maybe it was a year or something.

Q. What happened on this occasion, Mr. Barber, the one where you said you didn't get any money?

Mr. Carluccio: May he place not only the time but where this was, what ship, and so forth?

Mr. Starkey: I am asking the witness to give the whole story, the place and the conversations.

The Court: Just tell us what happened.

A. I am trying to tell you, your Honor, as best I can.

The Court: All right.

(145)

The Witness: I don't want to say something that I don't know what I am speaking about.

The Court: Just tell us.

A. The best I can remember would be possibly about a year.

The Court: And then what happened? Tell us all about it.

The Witness: Well, I only said I took the package off and I didn't get paid. That's all I can say.

Q. When did you first talk to him on this occasion about carrying the package off?

Mr. Somers: Talk to whom?

The Witness: Where did I first talk to him at?

Mr. Pogoda: To which defendant?

Q. The question was with reference to your breaking off with Massiah. That was the question. Now, you said that you didn't get any money the last time you took the package off. Now, we want to know all about that. Tell us where it was, and what happened, what he said to you and what you said to him. A. Well, I just said that I brought

the package off and he said that I would see him at his house.

Q. From where did you carry the package? A. To Eighth Avenue, in the bar.

(146)

Q. And where did you start? A. From aft of the No. 5 hatch.

Q. On the ship? A. Yes.

Q. And you had a conversation with him at that time? A. Not too much.

Q. Well, yes, but what was the conversation? A. He asked me would I take the package off of the ship.

Q. Yes: And what did you say? A. I said yes.

Q. O.K. Now, did there come a time then when you did? A. That was the time then.

Q. What did you do with the package? A. I gave it to him on Eighth Avenue in a bar.

Q. What did he say to you at that time? A. He said he would see me later at his house.

Q. And did you see him later? A. I did so.

Q. How much later? A. The following Saturday.

Q. Did you have a conversation with him then? (147)

A. (No answer.)

Q. At his house? A. Well, I only stayed there about five minutes.

Q. The question, Mr. Barber, was did you have a conversation with him?

The Court: What did he say? Tell us what happened at the house.

The Witness: He only told me, he said he didn't have any money because he was stuck up, and I only stayed there about five minutes and I walks out.

Q. Did you have any conversation at that time, any further conversation? A. Well, he introduced me to two guys. Who they was, I don't know.

Q. Did you see anybody else there that you knew? A. Anybody else excusing the two guys?

Q. Besides Winston Massiah and you. A. I am saying those two guys was there but I don't know who the fellows was. He introduced me to them but who they was, I don't know.

Q. Did you see anybody else there besides him and the two fellows? A. Well, Jesse Colson walks in.

Q. Did you have any conversation with him? (148) A. Only one word, that's all.

Q. What? A. He only said that I didn't believe that there was a stickup and I stood there a few minutes and I walks out.

Q. Was there any conversation other than that that you can recall? A. I can't remember now.

Q. You keep trying, Mr. Barber.

(Pause.)

The Court: Did he tell you when you would get your money?

The Witness: No, he didn't.

Q. Did Winston say what he meant by being stuck up? A. No, he didn't. I can't recall right now.

Q. Was there any conversation you can recall about the contents of the package? A. (No answer.)

Mr. Starkey: I ask the Court to direct the witness to answer the question.

The Court: I think he is trying to think. Suppose you answer the question now.

The Witness: Your Honor, if you will give me time to remember——

(149)

The Court: Sure.

The Witness: I have to try to remember.

The Court: Sure.

Mr. Pogoda: If the Court please, I think this witness has constitutional rights of which he should be advised.

The Court: Well, I think he ought to assert them for himself. I think it is your responsibility.

Suppose you answer the question?

The Witness: If I can recall it, I will.

Q. Mr. Barber, do you recall a conversation at that time about the contents of what was in the package you carried off? A. (No answer.)

Mr. Carluccio: You Honor, I join in the request that he be advised of his constitutional rights.

Mr. Starkey: Your Honor, I object.

Mr. Carluccio: It is the first time he has stated, or, that he will be stating that he knew what was in the package and it would be greatly to his detriment, your Honor.

Mr. Starkey: I object to comments of this kind by defendants' counsel.

The Court: I can understand your concern for (150) the witness and his constitutional rights, but you have a responsibility in connection with this witness's constitutional rights. Let us proceed.

Mr. Starkey: Your Honor, I ask at this time for permission to refresh the witness's recollection by leading.

James Barber—for Government—By the Court

The Court: Well, it is twenty-five minutes to five. We are going to recess this case until 10:30 tomorrow morning and the jury is under the same instructions now as it was at the luncheon recess. Don't discuss the case with anybody. If anyone attempts to discuss it with you, report the matter to the Court. You will report to the room in the rear of the courtroom at 10:30 tomorrow morning.

Let the jury step out, please.

(Jury excused.)

The Court: Now, Mr. Witness; you come back here at 10:30 tomorrow morning and you come directly here from home; do you understand that?

The Witness: Yes.

The Court: Do you understand what I am talking about?

The Witness: I understand.

The Court: All right.

(151)

Mr. Archer: May I say something to the Court?

With reference to the remand, your Honor, is the order of remand still in force?

The Court: The order of remand is still in force, yes.

Come straight here and don't stop at any of these bars on the way; do you understand?

The Witness: O.K.

The Court: This man is not in custody, is he?

Mr. Starkey: No, he is not.

(Adjourned to Friday, June 16, 1961, at 10:30 o'clock a.m.)

(152)

New York, June 16, 1961,
10:30 a.m.

(Trial resumed)
(Jury present.)

JAMES BARBER resumed.

The Court: Swear the witness again.

JAMES BARBER having been previously duly sworn, was resworn and testified further as follows:

Redirect examination by Mr. Starkey:

Q. Now, Mr. Barber, at the time that we recessed yesterday you were telling the Court and the jury about the conversation you had with Winston Massiah at his home. Do you recall that? A. Yes.

Q. When did that take place? A. In 1956.

Q. Do you recall when in '56? A. In the spring of the year.

Q. At his home? A. At his home? Yes, at his home.

(153)

Q. When did you meet Winston Massiah? A. 1956.

Q. When? A. On the ship.

Q. When in '56? A. In the spring of the year.

Q. Now when did you see him at his home? A. On a Saturday at noontime.

Q. And what was the conversation you had with him at that time? A. Well, he just told me that he didn't have any money, that the cocaine was taken away from him.

Q. That the what was taken away from him? A. The cocaine.

Q. Did he say anything else? A. Jesse walks in and he said like "I don't believe it" and I only stayed there a few minutes and I left.

Q. Did Jesse say anything when Winston said you didn't believe it? A. He said, "Yes, that's true."

Q. What did he say was true? A. That the cocaine was taken away from him.

Q. Now, when did that happen? A. In 1956.

(154)

Q. What part of '56? A. I would say as near as I can remember the spring of the year.

Q. You mean it happened at the same time you met Winston Massiah? A. No. It happened six months later.

Q. Six months after you met him? A. That's right.

Q. Well, then, that wouldn't be in the spring, would it? A. That would be in the spring. I said that is the best I could remember it was in the spring.

Q. I mean if it happened six months after you met him. A. That would be in the fall.

Q. Now, you testified that you had carried packages off for Jesse Colson. A. That's right.

Q. How many times did you do that? A. Only twice.

Q. When was the first time you carried off for him? A. Three months later, after I met Winston.

Q. And that was when you met Jesse? A. That is when I met Jesse.

(155)

Q. And when was the second time that you carried off packages for Jesse? A. About six weeks later.

Q. After the first time? A. Yes.

Q. Were these before or after the conversation at Winston's home when he told you about the stickup? A. Before.

Q. Do you know a man by the name of Sunny Hunter, or did you know a man by the name of Sunny Hunter? A. I know a fellow by the name of James Hunter.

Q. James Hunter? A. That's right.

Q. Do you know where he is now? A. He is dead.

Mr. Pogoda: That is objected to if the Court pleases.

The Court: What is the basis of the objection?

Mr. Pogoda: Unless a proper foundation is laid.

The Court: What is the purpose of the question? Is he named in the conspiracy count in the indictment?

Mr. Starkey: I believe he is, your Honor. I am really not certain of that but whether he is or not he (156) does have a direct relevance in this case and in this trial.

The Court: Is it your suggestion that you are going to attempt to connect Hunter up in here?

Mr. Starkey: Yes, your Honor.

The Court: I will overrule the objection.

James Hunter is named as a co-conspirator.

Mr. Starkey: That was my recollection, your Honor, but I didn't want to make a definite statement without checking it.

Q. Do you know where Sunny Hunter is now? A. He is dead.

Q. Do you know whether or not Hunter ever carried packages off Grace Line vessels?

Mr. Somers: I will object to that.

The Court: I will sustain the objection. Rephrase the question. Ask him if he ever saw him.

Q. Did you ever see James Hunter carry packages off? A. I saw him once carrying some off. He told me about it.

Q. Now, on how many occasions did he carry off, if you know?

Mr. Somers: I object to that.

(157)

Mr. Carluccio: I object, your Honor, because he said "packages." It could be any kind of packages.

The Court: I think you ought to rephrase your question.

Who was Hunter? What was his work?

The Witness: Longshoreman.

The Court: He worked with you?

The Witness: Worked with me in the same gang.

The Court: I see. Now, you say you saw him carry a package off on one occasion.

The Witness About three times, I guess, is the rate I can remember.

The Court: You say you saw him carry packages off three times.

The Witness: That's right.

The Court: Suppose you tell the jury the circumstances of these three occasions? In other words, just tell the jury all you know about them.

The Witness: Well, Sunny taking the packages off, but he didn't know what was in the packages.

Mr. Carluccio: Objection, your Honor. I don't

see how he would know whether the other person knew what was (158) in the package.

The Court: What is the basis of your statement that he didn't know what was in the package?

The Witness: I mean, he didn't know. I didn't know myself.

The Court: You didn't know what was in the package either?

The Witness: I did not.

The Court: And why do you say Sunny didn't know or Hunter didn't know?

The Witness: Well, he didn't say anything about he knew.

The Court: And that is the basis of your statement, the fact that he didn't tell you he knew.

The Witness: That's right.

The Court: All right. Take the witness.

Q. Now, do you recall when it was that, the three occasions that you have just talked about? A. The last part of '56 and the first of '57.

Q. And will you tell the jury whether or not you had any conversation beforehand with him about this? A. With who?

Q. With Sunny Hunter. A. Did I have a conversation with him?

(159)

Q. Yes. A. Yes, I did.

Q. What did you say to him? A. I told him——

Mr. Carluccio: I object before this answer comes out. First, Hunter is dead. Secondly I don't see how Hunter's conversation is an admission against the defendants here.

The Court: I assume that counsel is attempting to show that Hunter not only was named in the indictment count but also was a member of the conspiracy and that his actions and statements in furtherance of the conspiracy are chargeable to all the defendants. I assume that is what is happening. I will overrule the objection.

All right, answer the question.

Did you have a conversation with Hunter about carrying things off the vessel?

A. I told Sunny that Jesse had a package that he wanted taken off and I couldn't take it off and if Sunny would take it off for him.

Q. Whom did you say that to? A. To Jesse.

Q. You had a conversation with Jesse? (160) A. That's right.

Q. On each of these three occasions? A. Not on the three of them. For the first one of them.

Q. And what was said? A. He said he had a package that he wanted me to take off, but Hunter didn't know what was in the package.

Q. What did you say to Jesse and what did Jesse say to you? A. I told him that Sunny would take the package off for him, and I showed him to Sunny.

Q. Did there come a time when you introduced Sunny to Jesse? A. Yes, I introduced him to him.

Q. And what happened then? A. And I—the first time I didn't introduce him to him. I only showed him to Jesse and sent him on the ship.

Q. Then what happened? A. That is when he gave him the package.

Q. Gave who the package? A. Sunny.

Q. Did you see what Sunny did with it? A. Sunny went out to the street with it.

(161)

Q. Did Sunny tell you afterwards what he had done with the package outside? A. He waited on the street and directly at that time he didn't say where he would give it to him.

Q. Did there come a time thereafter when you received the money from Jesse? A. That's right.

Q. Did you have any conversation with Jesse at that time when he gave you the money? A. No, I didn't. In the conversation he only walked by me and—I met him in the hallway on the ship around the balloom and there is where he gave me the money.

Q. Now, will you tell the Court and jury what happened on the second and third times that Hunter carried off packages, from the beginning, from conversations with Jesse, if any.

Mr. Pogoda: May we have a time, if the Court pleases, and the ship from which it was carried off.

Q. Do you know what the ship was? A. No, I don't know what ship it was.

Mr. Starkey: I think the witness has already given a time, your Honor.

The Court: For counsel's benefit will you give (162) us the time again? About when did these three occasions take place?

The Witness: Around the last part of '56 and the first of '57.

The Court: All three of these occasions did?

The Witness: That's right.

The Court: And how far apart were they, one week, two weeks, a month?

The Witness: About six weeks.

The Court: They were six weeks apart?

The Witness: Something like that.

The Court: Can you fix the time any closer than that?

The Witness: I cannot.

The Court: All right, take the witness.

Q. Do you know how long it takes a ship to go on a voyage, a Grace Line vessel, and return? A. Well, the regular one takes around six weeks to make a trip.

Q. All right. Now will you tell the Court and jury what happened on the second and third occasions that you say——

Mr. Pogoda: If the Court pleases, I respectfully object to this line of questioning. The overt acts alleged in count 8 of the indictment only cover one (163) incident with James Hunter and anything beyond that I think is something for which these defendants were unable to prepare for trial, and certainly it is not admissible against these defendants at this time.

The Court: That is overruled. The government is not limited to proof of just the overt acts shown in the indictment.

All right, answer the question, please.

A. About the last time.

James Barber—for Government—Direct

The Court: Repeat your question.

Q. Will you tell the Court and jury what happened on the second and third occasions when you say Jimmy Hunter carried packages off? Did you have conversations with Jesse on those occasions? A. Only one.

Q. And what was said? A. I told him—he said he had the packages he wanted to take off and I told him I couldn't take it off, but I had a boy that would take it off for him and I told him I would show him the boy and I went on the dock and showed him to Sunny, and that is when Sunny went up on the ship.

Q. How many times did you receive money from Jesse after you say Sunny carried off packages? (164) A. Three times.

Q. And did Jesse tell you what happened on those occasions? A. On those occasions, the last three times?

Q. Yes, did he tell you what happened when he gave you the money? A. No, he didn't tell me what had happened.

Q. How do you know that Jimmy Hunter carried off the last two times, or on three occasions? A. You see, he told me about it.

Q. Who did? A. James Hunter.

Q. What did he tell you ? A. After he had taken them off.

Q. What did he tell you? A. He told me he had taken off two packages.

Q. Besides the first one when you were there? A. Besides the first one.

Q. Well, did he say whether or not he received money for it? A. No, he didn't.

Q. How do you know? A. Because he told me he didn't receive no money.

Mr. Carluccio: Your Honor, if the Court please, (165) I object again to this line of questioning with reference to Hunter because, for one, Hunter isn't any defendant in the case, and two, Hunter is dead, and three, it is all based upon hearsay of which we have no opportunity to refute. I make that objection for the record.

The Court: All right, sir. Same ruling.

Take the witness.

Q. Did you say before that you received the money from Jesse on the other two occasions? A. That is what I said. I received the money and he gave it to me and I put it in my pocket but how much I don't know because I had some money in my pocket.

Q. Who told Jesse to give you the money instead of to Hunter? A. I told Jesse that.

Q. Do you know whether or not Hunter received any money after that? A. I don't know about that.

Q. Didn't you pay him money? A. I gave him half of it.

Q. On each occasion? A. That's right.

Q. When did you tell Jesse not to give any money (166) to Jimmy Hunter but to give it to you? A. On the ship.

Q. How many times? A. It was three times.

Q. Three times you told him that? A. Three times.

Q. And that would be before the package was carried off on each occasion? A. No, it wasn't before. I can't remember just recalling that, whether it was before or after.

Q. And when did these three incidents occur?

The Court: We have been through that twice already now.

Mr. Starkey: All right, your Honor, I have no further questions.

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(296)

PAUL KING, called as a witness by the government, having been first duly sworn, testified as follows:

Direct examination by Mr. Starkey:

Q. What is your occupation, sir? A. Merchant seaman.

Q. How long have you been a seaman? A. Ever since I have been 15 years old.

Q. Do you know Jesse Colson? A. Yes, I did.

Q. When did you first meet him? A. I met him in 1946 in Odessa, Russia.

Q. Did there come a time thereafter when you renewed your acquaintance with him in 1958? Yes, sir.

Q. Did there come a time in 1958 when you sailed on the Santa Maria of the Grace Lines? A. Yes, sir.

Q. Do you recall when it was that you sailed on that occasion, Mr. King? A. It was February. I joined the ship on February 26th.

Q. And how long after that did you sail? A. It was March 1st.

Q. Did there come a time, after you signed on, (297) that you had a conversation with Jesse Colson? A. Yes, sir.

Q. Where did that conversation take place? A. At his home.

Q. What did he say to you and what did you say to him at that time?

Mr. Pogoda: If the Court pleases, I assume this is with reference to count 8 of the indictment.

The Court: This is with reference to the conspiracy count, I think.

Mr. Starkey: That's correct, your Honor.

The Court: All right. What did you say to him and what did he say to you at that time?

A. He asked me, since I was going down to South America, would I pick up a package of paint solids for him. And I agreed to do so.

Q. And was anything else said at that time? A. Well, he gave me a letter to give to people in South America. It was written in Spanish, and so the address was that of people in South America.

Q. Where in South America? A. Chile.

Q. What city? A. Valparaiso.

(298)

Mr. Carluccio: Your Honor, what date is this that he is speaking about?

The Court: Did you give him a date?

Mr. Starkey: Your Honor, I believe the witness testified that it was between signing on on February 26th and the time of sailing on March 1st.

Q. Did he give you anything else besides the letter? A. I believe it was part of a playing card. He said that he would send half the playing card down there and I should keep the other half.

Q. What were you to do with the other half? A. I was supposed to present it to the fellow who had the paint solids.

Q. And you sailed on March 1st? A. March 1st.

Q. What did you do when you arrived in Valparaiso? A. Well, I still had this letter in my suit coat pocket and I practically forgot all about it, and so I was out in the streets for the first time I was in Valparaiso so I was looking over the town and I happened to run my hand in my coat pocket and I came up with this letter. So I caught a cab and went to this address.

Q. And what happened when you got these? A. Well, I knocked on the door and a woman answered (299) the door, and she asked me what did I want. So I presented her with the letter. And she asked me would I come in and I came in and she told me to sit down and then a fellow came out, and he looked at the letter and told me to wait. So I did so.

Q. What happened thereafter? A. Well, about three-quarters of an hour or a half hour, within that period of time, he came back out with a package, and he gave me the package and said thank you. So I took the package and left.

Q. What did you do with the package? A. Well, I stuck it in my coat pocket and went on around the city looking at the city, and then when I reached back to the ship I just took it and threw it in my locker.

Q. Now, on the way back to New York did there come a time when you received a letter? A. Yes. Jesse wrote me a letter. I received it in Callao, Peru.

Q. Did you ever discuss that letter thereafter with Jesse? A. No, I don't believe so.

Q. How do you know it was from Jesse? Did you recognize his handwriting? A. Yes, I did.

(300)

Q. Now, do you still have that letter? A. No, sir, I don't.

Q. What did you do with it? A. I imagine I destroyed it, threw it away, like I do most all my letters.

Q. Do you recall what he said in the letter? A. Well, it was mostly small talk. In the letter he said that if anyone should ask what happened to the paint solids besides him to tell them that I misplaced it or I threw it away or lost it, or something like that.

Q. Now, do you recall when you arrived back in New York? A. It was April 7th, I believe.

Q. Do you recall whether in the letter he mentioned anybody else? A. He mentioned, I believe, a fellow by the name of Duke.

Q. What did he say about Duke? A. He said if Duke should ask me what happened to the paint solids, to tell him that I lost it.

Q. Do you know who Duke is? A. He was a friend of Jesse's, or is a friend of Jesse's.

Q. When did Jesse introduce you to him? (301) A. I met Duke some time before I caught the ship.

Q. Do you recall what Jesse said when he introduced you to him? A. No, I don't.

Q. Do you know Duke's real name to be Mitchell Anfield? A. No, I don't.

Q. Do you see Duke in the courtroom? (A pause) A. No, I don't believe so.

Q. Do you want to get off the stand and come down and look? (A pause) A. I believe that is him over there.

Q. What kind of clothes is he wearing? A. He is wearing a brown sport coat, I believe, a checkered sport coat.

Q. Will you go down next to the man and look at him, please? A. I don't even see him. I don't remember him. In the pink shirt.

Q. Will you return to the witness stand, please.

Mr. Starkey: Let the record show that the witness identified the defendant Anfield.

(302) A. It's been a long time since I saw him.

Q. Now when you returned to New York do you recall when you arrived? A. It was April 7th, I believe.

Q. What happened when you arrived in New York? A. When I arrived in New York Jesse and Duke meet me when I was coming off the ship. They were waiting outside the gate. So Jesse greeted me and they started talking. So he asked me what did I do with the package, the paint solids, and I then recalled the letter, and told him that I lost it.

Q. The paint solids? A. The paint solids.

Q. What was said then? A: Well, there was some discussion of how I lost it, or why did I lose it, or something like that.

Q. Who discussed it? Who said what? A. Well, the discussion was between Duke and Jesse.

Q. And what was said to the best of your recollection? A. Gee, it's been a long time. I can't exactly tell you exactly what was said.

Q. Did you have any conversation, you, yourself, (303) with Duke, or he with you? A. Well, the conversation was mixed up between three.

Q. Do you recall anything Duke said to you? A. No, not offhand.

Q. Where did you go from the pier? A. We went uptown and went to a couple of bars and had a few drinks, and then they took me home.

Q. Was there any conversation before they dropped you off? A. Well, there was conversation back and forth about different things, and about the paint solids also.

Q. Was there any more said about them? A. Well, I don't exactly remember what was said but there was some discussion of it.

Q. Well, what did you do thereafter? A. Well, I went home and Jesse asked me did he want me—did he want for me to pick him up, or did he want—let me get this straight. Did he want him to pick me up in the morning.

Q. To do what? A. To take me back down to the ship.

Q. What did you say? A. I agreed, yes.

(304)

Q. Was there any further discussion with him about the package after Duke was gone? A. No.

Q. Then the following morning did there come a time when he did pick you up? A. Yes, he did.

Q. Was he alone? A. No, he was with another fellow called Icky.

Q. Do you see Icky in the courtroom? A. No, I don't remember him. I only saw him once.

Q. But you rememer the name Icky? A. Yes.

Q. What happened after Jesse and Icky picked you up? A. They took me down to the pier, and I was a little late, so I wanted to go right in as soon as I possibly could, so they stopped to get some coffee, and it was at this little restaurant, so I went right in, and I was informed when I went aboard the ship that it was my day off, because it was a policy of Grace Line at the time that one man would get—half the crew would get a day off in each port, I meant home port.

So after I found out that I had the time off, I said, well,

rather than have them come on the ship, pick up the package and talk and fool around on the ship, (305) I would rather get off the ship right there and then and go back home. So I picked up the package and walked out off the ship with it.

Q. And then what did you do with it? A. Well, I walked out the gate with the package, and I handed it to Jesse.

Q. Was there any conversation at that time? A. Yes, there was. He said I was a darn fool for bringing the package out. I asked him why. He said because I could have gotten myself in a lot of trouble. I said, "What kind of trouble. It's paint solids." He said, "You still shouldn't have took the package off. I didn't want you to bring it off." I told him, "Well, why is it you didn't want me to take the package off?" He says "Because it is narcotics," and I got pretty warm at him because I seen my seaman's going, my job and everything else.

Q. You got what at him? A. I got pretty peeved, I got angry at him.

Q. Did you tell him so? A. Absolutely.

Mr. Starkey: No further questions.

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(1385) • • •

FINBARR J. MURPHY, called as a witness on behalf of the government, being duly sworn, testified as follows:

Direct examination by Mr. Starkey:

Q. What is your occupation, Sir? A. I am a customs agent with the Treasury Department, Bureau of Customs.

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(1411) • • •

The Court: Did you see the defendant Anfield enter Colson's car?

The Witness: I did.

(1418) • • •

By Mr. Starkey:

Q. Will you state what was said by Anfield on this occasion. A. He stated that he had made one run down to (1419) Valparaiso, Chile. It was on the Santa Louisa. And at the time he brought it into the country here, he had it hidden in his mattress. He stated that he was not worried about being arrested, because since the Massiah arrest, approximately two years had transpired, and, "if I were to be arrested I would have been arrested long ago."

He stated that he had received a fair deal from Jesse Colson, that after every sale was made the money was split down the middle on the table, and if there was any cocaine left it would be split, too.

Q. Was anything said about when this run took place? A. This, yes. This run that the defendant Anfield made was after the stickup of the defendant Massiah. He stated that, "After the stickup I made the run. Then you made two or three more, Jesse, and then we got defendant Massiah back in, and it was at this time that all the trouble started, when you brought that boy Paul King into this deal." And his story about coming back with eight ounces being thrown overboard.

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(1421) • • •

Q. Did there come a time thereafter when you had a conversation directly with Anfield? A. Yes. On the date of the arrest in this building, just prior to his arraignment, I was speaking with another agent in the corridor, and the defendant Anfield called me over and said——

(1422)

The Court: Just a minute, please.

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A. This was just a conversation I had with the defendant Anfield. No other defendants were mentioned.

As I stated before, he told me he wanted a drink of water, and, as I approached him, he started to walk outside, and he said, "Wait a minute, Murphy."

I said, "What is it?"

He says, "Well, I would like to come clean."

So I said, "Well, tell me."

He said, "Well, I did bring in cocaine on the Santa Luisa."

I asked him where he kept it. He said he kept it in his locker. I asked him, "Well, how much was it?"

(1423)

He said, "Approximately eight ounces."

I stated, "Well, are you willing to make a statement to that effect after the arraignment?"

He said, "Yes. I want to cooperate fully."

And that was about the sum and the substance of the conversation.

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